SUPREME COURT, U.S.
FILED

0112 MAR 04 2002

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No.

IN THE

Supreme Court of the United States

SAM MCINNIS AND TIM SHINGLETON,
Petitioners,

v.

PAMELA ALICE LITTLE DANIEL, AS ADMINISTRATRIX OF THE ESTATE OF JOE ED DANIEL,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR A WRIT OF CERTIORARI

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148

QUESTIONS PRESENTED

1. Whether a defendant can be subjected to personal jurisdiction consistent with the Due Process Clause when his limited contacts with the forum have no causal nexus or relationship to the plaintiff's cause of action.

2. Whether a defendant can be subjected to personal jurisdiction consistent with the Due Process Clause based on the attributed conduct of other parties and the plaintiff's mere allegations of reprehensible conduct.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Michael Borka was a party to the proceedings in the court below. Additional defendants were named in the separately captioned trial court proceedings but were not parties in the court below, including Nationwide Industries, Inc.; Pandora Manufacturing, Inc.; Pennzoil-Quaker State Co.; Hughtone Industries, Inc. and its owner/officer Paul Hughett; Montfort A. Johnsen and Associates, Ltd. and its owner/officer Montfort A. Johnsen; Safety Consulting Engineers, Inc. and its owner/officer or employee James C. Dahn; Sweat Tire Company, Inc.; and Aerofil Technologies, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

I. Factual Background 3

II. Proceedings In The Court Below 5

III. How The Federal Question Was Presented 8

REASONS FOR GRANTING THE WRIT 9

I. Review Is Necessary To Establish The Proper Test For Determining Whether A Claim Arises Out Of Or Relates To The Defendant's Contacts With The Forum 9

A. There Is A Three- Or Four-Way Conflict Among The Lower Courts Concerning The Necessary Relationship Between The Plaintiff's Cause Of Action And The Defendant's Contacts With The Forum 11

B. The Decision Below Dispenses With Any Causal Nexus Or Relationship Between The Cause Of Action And The Defendant's Forum Activities 16

II. The Alabama Court's Reliance On "Stream Of Commerce" And "Reprehensibility" Factors Conflicts With Decisions Of This And Other Courts 18

TABLE OF CONTENTS—Continued

Page

A. The Decision Below Improperly Attributes The "Stream Of Commerce" Contacts Of A Corporation To Individual Officers And Shareholders 18

B. The Decision Below Erroneously Creates A "Reprehensibility" Exception To The "Minimum Contacts" Requirement 24

C. The Decision Below Improperly Collapses The Distinction Between Specific And General Jurisdiction 26

III. The Questions Presented Are Of Recurring And Substantial Importance 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES **Page(s)**

Akro Corp. v. Luker, 45 F.3d 1541 (Fed. Cir. 1995) 10

Alpine View Co. v. Atlas Copco AB, 205 F.3d 208 (5th Cir. 2000) 22

Arkansas Rice Growers Coop. Ass'n v. Alchemy Indus., Inc., 797 F.2d 565 (8th Cir. 1986) 21

Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102 (1987) 6,18,27

Ballard v. Savage, 65 F.3d 1495 (9th Cir. 1995) 14

Blaschka-Mansfeldt v. Vitek, Inc., No. C2-89-1114, 1989 WL 131525 (Minn. App. Nov. 7, 1989) 24

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 9,10,23,24,25,27,28

Calder v. Jones, 465 U.S. 783 (1984) 19,20

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) 2,10,28

Chew v. Dietrich, 143 F.3d 24 (2d Cir. 1998) 11,12-13

Columbia Briargate Co. v. First Nat'l Bank In Dallas, 713 F.2d 1052 (4th Cir. 1983) 21

CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) 16

Consolidated Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286 (11th Cir. 2000) 22

TABLE OF AUTHORITIES—Continued

Page

Cruz v. Ortho Pharm. Corp., 619 F.2d 902 (1st Cir. 1980).....21

Doe v. American Nat'l Red Cross, 112 F.3d 1048 (9th Cir. 1997).....14

Felch v. Transportes Lar-Mex SA DE CV, 92 F.3d 320 (5th Cir. 1996).....26

Fisher v. District Court, 424 U.S. 382 (1976).....2

Gundle Lining Constr. Corp. v. Adams County Asphalt, Inc., 85 F.3d 201 (5th Cir. 1996).....11,20,22

Helga v. Bonney, No. 96-1664, 1997 U.S. App. LEXIS 18179 (4th Cir. July 21, 1997).....20,21

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).....2,9,10,11,12,27

International Shoe Co. v. Washington, 326 U.S. 310 (1945).....9

Keeton v. Hustler Magazine, Inc., 465 U.S. 770.....19,20

Lakota Girl Scout Council, Inc. v. Harvey Fundraising Mgmt., Inc., 519 F.2d 634 (8th Cir. 1975).....22

Lehigh Valley Indus., Inc. v. Birenbaum, 389 F. Supp. 798 (S.D.N.Y.), *aff'd*, 527 F.2d 87 (2d Cir. 1975).....21

Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n, 142 F.3d 26 (1st Cir. 1998).....13

Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560 (2d Cir. 1996).....25,26

TABLE OF AUTHORITIES—Continued

Page

Milliken v. Meyer, 311 U.S. 457 (1940) 9

Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916) 2

Nowak v. Tak How Invs., Ltd., 94 F.3d 708 (1st Cir. 1996) 13,14

Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267 (9th Cir. 1995) 26

Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) 9

Prejean v. Sonatrach, Inc., 652 F.2d 1260 (5th Cir. Unit A Aug. 1981) 15,26

RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272 (7th Cir. 1997) 13

Ruger v. Superior Court, 118 Cal. App. 3d 427 (Cal. App. 1981) 21,23,24

Shaffer v. Heitner, 433 U.S. 186 (1977) 27

Shoppers Food Warehouse v. Moreno, 746 A.2d 320, *cert. denied*, 530 U.S. 1270 (2000) 12,15,18

Shute v. Carnival Cruise Lines, 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991) 14,27

Stuart v. Spademan, 772 F.2d 1185 (5th Cir. 1985) 20,22

Tatro v. Manor Care, Inc., 625 N.E.2d 549 (Mass. 1994) 14,15

TABLE OF AUTHORITIES—Continued

Page

Thomason v. Chemical Bank, 661 A.2d 595 (Conn. 1995) 11

United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080 (1st Cir. 1992) 13

United States v. Swiss Am. Bank, Ltd., 274 F.3d 610 (1st Cir. 2001) 10,13,27

Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Prods. Co., 75 F.3d 147 (3d Cir. 1996) 26

Vons Cos. v. Seabest Foods, Inc., 926 P.2d 1085 (Cal. 1996) 10,16

Williams v. Lakeview, 13 P.3d 280 (Ariz. 2000) 11

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 6,18,23,28

CONSTITUTION, STATUTE AND RULE

U.S. CONST. amend. XIV, § 1. 2

28 U.S.C. § 1257(a) 1,2

4th Cir. R. 36(c) 21

OTHER AUTHORITIES

Alex Wilson Albright, *In Personam Jurisdiction: A Confused And Inappropriate Substitute for Forum Non Conveniens*, 71 TEX L. REV. 351 (1992) 12

TABLE OF AUTHORITIES—Continued

Page

Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769 (1995) 12

Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583 (2001) 12

Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: Its Not General Jurisdiction or Specific Jurisdiction, but Is It Constitutional?*, 48 CASE W. RES. L. REV. 559 (1998) 12

PETITION FOR A WRIT OF CERTIORARI

Petitioners Sam McInnis and Tim Shingleton respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case. The decision below exacerbates the existing conflicts among the state and lower federal courts on the questions presented. By holding that very limited contacts with the forum state that have nothing to do with the plaintiff's cause of action can nonetheless support the exercise of personal jurisdiction over non-resident defendants, the Alabama Supreme Court has violated the requirements of the Due Process Clause. By further holding that this jurisdictional defect can be cured by attributing to defendants the actions of other parties and by the plaintiff's allegations of reprehensible conduct, the Alabama Supreme Court has taken an extreme position that would justify personal jurisdiction in almost any case. The formulation of the law created by the court below eviscerates the "minimum contacts" regime established by this Court to guard against overbroad assertions of personal jurisdiction.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra*, 1a-26a) is not yet published, but is unofficially reported at 2001 Ala. LEXIS 403. The order of the trial court (App., *infra*, 27a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on November 2, 2001. On January 25, 2002, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including March 4, 2002. *See* Applic. No. 01A544.

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(a). Petitioners filed an original petition for a writ of mandamus in the Supreme Court of Alabama seeking a determination that the state trial court in the underlying litiga-

tion lacked personal jurisdiction over petitioners. The judgment below denied petitioners' original petition, and accordingly it constitutes a "final decision" within the meaning of 28 U.S.C. § 1257(a). *See Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916) (holding that Alabama judgment deciding a writ of prohibition concerning jurisdiction constitutes a separate suit and is a "final judgment"). As this Court has held, "[a] judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, even if further proceedings are to be had in the lower court." *Fisher v. District Court*, 424 U.S. 382, 385 n.7 (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property without due process of law."

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

This Court has approved the exercise of long-arm jurisdiction in cases arising out of or relating to a non-resident's contacts with the forum state, *e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984), but has expressly left open the question of the appropriate test for determining whether a defendant's contacts are sufficiently related to the cause of action to justify the assertion of personal jurisdiction (*id.* at 415 n.10). As a result, the lower state and federal courts are increasingly confused and divided over that question. This Court granted certiorari to decide that question in *Carnival Cruise Lines, Inc. v. Shute*, 498 U.S. 807 (1990), but ultimately decided the case on other grounds, 499 U.S. 585, 589 (1991). In the intervening years, the dis-

agreement among the lower courts has continued to widen, and some courts have further intensified the confusion and uncertainty in this area of the law by steadily extending the outer boundaries of the "relatedness" concept.

The decision of the Supreme Court of Alabama in this case is the latest example of that troubling trend. The decision below renders the relatedness requirement effectively superfluous, and supplants this Court's traditional "minimum contacts" framework with an amorphous and standardless sliding scale based on the vicarious attribution of other defendants' contacts and a subjective examination of the perceived "reprehensibility" of the defendant's alleged out-of-state conduct. For the reasons set forth below, this Court's review is necessary to resolve the existing conflict and confusion concerning the proper test for "relatedness," and to reaffirm the long-standing due process requirement that a state's exercise of long-arm jurisdiction must be based on the minimum contacts of each individual defendant over whom jurisdiction is asserted.

I. Factual Background

This case arises out of a wrongful death suit filed by respondent in Alabama state court. At all times relevant to this case, petitioners Sam McInnis and Tim Shingleton were residents of North Carolina. App., *infra*, 3a. Between 1993 and 1997, petitioners were officers or employees of Snap Products Inc. ("Snap"), a North Carolina corporation located in North Carolina. *Id.* at 10a. McInnis was employed as Snap's Vice-President of Sales, and later as Chief Executive Officer. Shingleton worked for Snap as Regional Sales Manager, Vice-President of Sales, and finally as President of Operations. *Id.* From 1995 through 1997, petitioners were also shareholders in Snap's corporate parent, Snap Automotive Products, Inc. ("Snap Products"), a Delaware corporation with its principal place of business in North Carolina. *Id.* at 6a.

During the relevant time period, Snap marketed more than 70 products nationwide, including a "Fix-a-Flat" prod-

uct designed to inflate flat car tires rapidly in emergency situations. App., *infra*, 9a. In the course of their duties as employees of Snap, petitioners occasionally traveled to Alabama on company business. Specifically, in 1994 or 1995, McInnis traveled once to Alabama on behalf of Snap to visit an existing customer. *Id.* at 9a. The purpose of this visit was to encourage the customer to carry Snap's entry-level line of products, a line that did not include the Fix-a-Flat product. *Id.* at 10a. The customer declined to carry the line and purchased no new Snap products as a result of the visit.

Similarly, Shingleton traveled to Alabama on behalf of Snap a total of four times between 1992 and 1995. App., *infra*, 8a. Two of those trips were to visit a potential customer in Tuscaloosa; that customer eventually purchased some of Snap's product line, but not the Fix-a-Flat product. *Id.* at 8a. The third trip was to visit a potential customer in Birmingham, and the fourth trip was to visit a representative of several local distributors in Mobile. Both of these trips focused on Snap's entire product line, not specifically the Fix-a-Flat product. *Id.* at 8a-9a. None of Shingleton's trips to Alabama specifically concerned the Fix-a-Flat product, and none of the trips resulted directly in the sale of that product in Alabama. *Id.* at 9a-10a.

On December 18, 1998, respondent filed suit in Alabama state court against Snap, its corporate parent Snap Products, its corporate officers McInnis, Shingleton, and Michael Borka, and other defendants. Respondent's complaint alleges that "[a]t all times relevant hereto," the corporate defendants "were engaged in the business of manufacturing and marketing" the Fix-a-Flat product "throughout the United States, including the state of Alabama," and that petitioners "were either employed in managerial capacities, or were owners and/or officers of [the defendant corporations] and in such capacities acted as agents of the companies." App., *infra*, 29a ¶¶ 4, 11. The complaint further alleges that the Fix-a-Flat product tortiously caused the death of Joe Ed Daniel on June 4, 1997, when it exploded while he was welding on the rim of a commercial road grader tire that had allegedly

been inflated using the product. *Id.* at 29a-30a ¶¶ 67-68. Respondent seeks damages for the alleged wrongful death of Daniel.

In the state trial court proceeding, petitioners filed motions to dismiss the complaint for want of personal jurisdiction. Each petitioner argued that he lacked the requisite minimum contacts with Alabama necessary to permit the Alabama courts to exercise personal jurisdiction over him consistent with the Due Process Clause of the Fourteenth Amendment, and submitted affidavits in support of the motion to dismiss. The parties agreed that petitioners could refrain from answering the allegations in respondent's complaint until after their motions to dismiss for lack of personal jurisdiction were finally decided. *See* App., *infra*, 3a.

The state trial court denied petitioners' motions to dismiss. App., *infra*, 27a. Petitioners filed a motion requesting that the trial court reconsider and reverse its denial of the motions to dismiss or, in the alternative, amend its order denying the motions to dismiss so as to allow the individual defendants to petition the Supreme Court for permission to appeal the trial court's denial of the motions. Petitioners' motion was denied without written opinion.

II. Proceedings In The Court Below

Petitioners then filed an original petition for a writ of mandamus in the Supreme Court of Alabama, requesting that court to direct the trial court to grant petitioners' motions to dismiss for want of personal jurisdiction. The Supreme Court of Alabama denied petitioners' mandamus petition in an opinion to be published in the Southern Reporter. App., *infra*, 1a-26a.[1]

After noting that Alabama law "extends the personal jurisdiction of Alabama courts to the limit of due process under

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[1] The court granted mandamus relief with respect to a third individual defendant, Michael Borka. *Id.* at 2a.

the federal and state constitutions," App., *infra*, 10a, the supreme court held that the "stream of commerce" analysis of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987), established the proper framework for analyzing the due process claims raised by petitioners, even though the Fix-a-Flat product was allegedly placed into the "stream of commerce" by Snap and/or the other corporate defendants. App., *infra*, 14a-15a. Relying on its understanding of *Asahi* and *World-Wide*, the court purported to examine whether petitioners "engage[d] in actions 'purposefully directed toward the forum State' so as to 'indicate an intent or purpose to serve the market in the forum State.'" *Id.* at 15a (citation omitted).

With respect to McInnis, the court noted that he had made one trip to Alabama in an unsuccessful attempt to convince an existing customer to carry Snap's "entry-level" product line—a product line that did not include the Fix-a-Flat product. App., *infra*, 17a. The court concluded, however, that "[t]he trip was still 'an act of the defendant purposefully directed toward the forum State' with 'an intent or purpose to serve the market in the forum State.'" *Id.* at 17a (citation omitted). The court reasoned that, "[h]ad the trip succeeded, it would have promoted not only the particular products accepted by Carport but also the brand name itself." *Id.*

In addition, the court found it significant that, for purposes of the motion to dismiss, petitioner McInnis "does not deny any of the substantive allegations of [respondent's] pleadings." App., *infra*, 17a. In particular, the court stated that McInnis did not deny that he was aware of the product's explosiveness and "that he learned of the three injuries caused by explosions of the product in 1995 and 1996 similar to the explosion which would kill Mr. Daniel in 1997." *Id.* The court also asserted that McInnis did not deny that, "with full knowledge of the explosiveness of the product and the injuries from it, he decided not to recall or to re-label the product." *Id.* In the court's view, the allegedly "reprehensi-

ble extent of McInnis's culpability, as established by the pleadings for the limited purpose of deciding his . . . motion to dismiss, increases the importance of McInnis's contacts with Alabama enough that" the assertion of personal jurisdiction was appropriate. App., *infra*, 17a.

With respect to Shingleton, the supreme court stated that he "visited Alabama four times" between 1992 and 1995 to market Snap's entire product line of more than 70 products. App., *infra*, 15a-16a. The court also thought it important that, for purposes of the motion to dismiss, Shingleton did "not dispute the plaintiff's allegations that Shingleton knew of the explosiveness of the Fix-A-Flat product, that he knew of the actual explosions which injured three men other than Mr. Daniel in 1995 and 1996, and that he participated in the decision thereafter not to recall or to re-label the product." *Id.* at 16a. The court concluded that the assertion of personal jurisdiction over Shingleton was appropriate because, in its view, Shingleton's actions were "purposefully directed toward the 'forum State' and 'indicate an intent or purpose to serve the market in the forum State." App., *infra*, 16a (citation omitted).

Justice Lyons, joined by Justices See and Brown, dissented from the majority's conclusion that personal jurisdiction existed over McInnis. App., *infra*, 22a-26a. The dissent objected that "[t]he majority opinion improperly displaces the long-standing constitutional requirement of 'minimum contacts' with a new, sliding scale based upon subjective views of the reprehensibility of the defendant's alleged conduct." *Id.* at 22a. As the dissent explained, "[t]he majority opinion cites no authority for its proposition that the reprehensibility of a nonresident defendant's conduct so 'increases the importance' of a defendant's single contact with a state as to make constitutional an otherwise unconstitutional exercise of *in personam* jurisdiction." *Id.* at 24a (citation omitted).

The dissent concluded that McInnis lacked sufficient contacts with Alabama to justify the assertion of personal jurisdiction over him. The dissent reasoned that McInnis's one visit to Alabama "cannot be the proximate cause of the dece-

dent's injuries because no sale of the Fix-A-Flat product was made as a result of his visit." App., *infra*, 23a. The dissent accordingly concluded that "[b]ecause the decedent's death did not arise from, or represent a clear, firm nexus to, McInnis's one contact with Alabama, the trial court cannot obtain specific personal jurisdiction over McInnis." *Id.* at 23a-24a.

III. How The Federal Question Was Presented

Petitioners raised their federal due process objection to the exercise of personal jurisdiction over them at every stage of the proceedings below. Petitioners sought dismissal in the trial court on the ground that they lacked sufficient contact with Alabama to justify that state's exercise of personal jurisdiction. Thus, McInnis argued that "[a] non-resident individual is not subject to the jurisdiction of the Alabama courts unless he has sufficient 'minimum contacts' with Alabama so that the exercise of *in personam* jurisdiction is consistent with the Due Process Clause of the Fourteenth Amendment." Mem. in Supp. of Motion of Sam McInnis to Dismiss for Lack of Personal Jurisdiction (Special Appearance) at 3. Similarly, Shingleton argued to the trial court that it must "look to [his] personal contacts with Alabama in order to exercise personal jurisdiction over him consistent with due process." Motion of Michael Borka and Tim Shingleton to Dismiss for Lack of Personal Jurisdiction (Special Appearance) at 1.

Petitioners expressly raised their federal constitutional claims in their original petition for a writ of mandamus in the Supreme Court of Alabama. In particular, petitioners argued that they "lack the requisite 'minimum contacts' with Alabama sufficient to make the exercise of personal jurisdiction by Alabama's courts consistent with the Due Process Clause of the Fourteenth Amendment." Petition for Writ of Mandamus of Defendants, Sam McInnis, Michael Borka and Tim Shingleton at 8. Petitioners further argued that "[t]he status of the individual defendants as employees or officers of Snap Products is *insufficient as a matter of law* to subject the individual defendants to the jurisdiction of Alabama's courts,"

and that "the single visit of Mr. McInnis and the limited visits by Mr. Shingleton to Alabama are insufficient to establish jurisdiction over those defendants because the plaintiff's claims do not arise out of those visits." *Id.* at 9.

REASONS FOR GRANTING THE WRIT

I. Review Is Necessary To Establish The Proper Test For Determining Whether A Claim Arises Out Of Or Relates To The Defendant's Contacts With The Forum

The Due Process Clause of the Fourteenth Amendment precludes the exercise of state court personal jurisdiction over a non-resident defendant unless that defendant has the requisite "minimum contacts" with the forum state such "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), *quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1940). Where, as here, a state court asserts specific personal jurisdiction over a defendant,[2] the requirement of minimum contacts is satisfied only if both (1) the non-resident defendant "'purposefully directed his activities at residents of the forum," and (2) "*the litigation results from alleged injuries that 'arise out of or relate to' those activities*." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citations omitted; emphasis added). If those two elements are established, courts must then consider a third factor: Whether the exercise of personal

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[2] When a State "exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Helicopteros*, 466 U.S. at 414 n.8. In contrast, general jurisdiction arises when the defendant's contacts with the forum state are so "continuous and systematic" that a state may exercise jurisdiction over *all* claims against the defendant, even those entirely unrelated to the defendant's contacts with the forum state. *Helicopteros*, 466 U.S. at 414 n.9 & 416; *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952).

jurisdiction comports with "fair play and substantial justice." *Burger King*, 471 U.S. at 476.

This Court has addressed the "purposefully directed" prong of the minimum contacts inquiry on numerous occasions, but has yet to specify the proper test for determining whether a plaintiff's injuries "arise out of or relate to" the defendant's contacts with the forum. *See United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 621 (1st Cir. 2001) ("[t]he requirement that a suit arise out of, or be related to, the defendant's in-forum activities comprises the least developed prong of the due process inquiry") (citation omitted). In *Helicopteros*, for example, this Court acknowledged but expressly declined to resolve the issue of "what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists." 466 U.S. at 415 n.10.

Subsequently, in *Carnival Cruise Lines, Inc. v. Shute*, 498 U.S. 807 (1990), this Court granted certiorari to resolve the question left open in *Helicopteros*. *See* Pet. for Cert. in No. 89-1647 at i ("Can a long-arm statute constitutionally reach a defendant whose activities in the forum state are insubstantial and bear only a tenuous relationship to the cause of action?"). Ultimately, however, the Court decided that case on other grounds and did not reach the "relatedness" issue. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991) ("we need not consider petitioner's constitutional argument as to personal jurisdiction"). This case presents precisely the same issue for which certiorari was granted in *Carnival*.

Because *Carnival* did not reach the due process issue, it has been left to the lower state and federal courts to determine the requisite degree of "relatedness" between a defendant's forum activities and the plaintiff's claim. *See, e.g.*, *Akro Corp. v. Luker*, 45 F.3d 1541, 1547 (Fed. Cir. 1995) (noting the absence of any "general pronouncements" from this Court "on the nexus required to satisfy th[e] 'arise out of or relate to' prong of the due process inquiry"); *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1096 n.4 (Cal. 1996)

("[t]he high court has declined to clarify the relatedness element of specific jurisdiction"); *Thomason v. Chemical Bank*, 661 A.2d 595, 600 (Conn. 1995) ("[the Supreme C]ourt has not articulated a standard for what constitutes 'arising out of'").

As demonstrated below, the lower state and federal courts have adopted multiple conflicting approaches to this issue. The division of authority over the governing test for "relatedness" continues to widen, and is further exacerbated by the decision below. This case presents an opportunity for this Court to resolve this important question and eliminate the existing uncertainty in the lower courts over this recurring issue.

A. There Is A Three- Or Four-Way Conflict Among The Lower Courts Concerning The Necessary Relationship Between The Plaintiff's Cause Of Action And The Defendant's Contacts With The Forum

The law is clear that a "court's exercise of specific jurisdiction is appropriate only when the nonresident defendant's contacts with the forum state arise from, or are directly related to, the cause of action." *Gundle Lining Constr. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 205 (5th Cir. 1996) (citing *Helicopteros*, 466 U.S. at 414 n.8). There is widespread confusion and disagreement among federal and state appellate courts, however, concerning the proper test for determining whether this "relatedness" requirement has been satisfied. Indeed, numerous courts have expressly recognized the existence of a substantial and continuing conflict among the authorities on this question.[3] Commentators have

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[3] *See, e.g., Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) (noting existence of a "split in the Circuits on the standard to be applied in determining if a tort claim 'relates' to the defendant's activities within the state"); *Williams v. Lakeview*, 13 P.3d 280, 283 (Ariz. 2000) ("[f]ederal courts have disagreed about the strength of the causal relationship that must exist between a defendant's forum activities and a plaintiff's

[Footnote continued on next page]

likewise noted the division and confusion among federal and state courts over this issue.[4]

Three principal lines of authority have developed in the nearly two decades since this Court noted, but declined to resolve, this open question in *Helicopteros*. Many courts have held that specific jurisdiction requires a causal relationship between the defendant's forum activities and the cause of action, but these courts are divided over the nature of the requisite causal nexus, with some courts concluding that "but for"

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claim"); *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 333 (D.C.) (en banc) ("jurisdictions have wrestled with the nexus requirement of specific jurisdiction in a variety of factual settings and have reached diverse conclusions as to the appropriate test for determining the proper nexus between the nonresident defendant's business activity and the claim asserted by the plaintiff"), *cert. denied*, 530 U.S. 1270 (2000).

[4] *See, e.g.*, Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 584 (2001) ("Although the formulas for general and specific jurisdiction suggest that the arising or related requirement presents problems for each, the source of the confusion is with specific jurisdiction."); Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: Its Not General Jurisdiction or Specific Jurisdiction, but Is It Constitutional?*, 48 CASE W. RES. L. REV. 559, 579 n.91 (1998) ("To date, the Supreme Court has provided very little guidance on how the nexus requirement may be satisfied. . . . In the absence of guidance from the Court, lower courts and commentators have struggled with various interpretations of the nexus requirement."); Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 771 n.4 (1995) ("Since the Supreme Court adopted this bifurcated mode of analysis in *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984), lower courts have grappled with defining the link between a dispute and defendant's contacts with the forum state necessary for the exercise of specific jurisdiction."); Alex Wilson Albright, *In Personam Jurisdiction: A Confused And Inappropriate Substitute for Forum Non Conveniens*, 71 TEX L. REV. 351, 380 (1992) ("Texas's confusion over specific and general jurisdiction is not surprising. Because of the Supreme Court's lack of guidance concerning whether a cause of action "arises from" contacts or whether the contacts are "continuous and systematic," many lower courts manipulate the parameters of specific and general jurisdiction to reach the desired result in a particular case.").

cause suffices while others require a showing of "proximate" cause. In addition to these two approaches, other jurisdictions have dispensed with a causal requirement altogether, focusing instead on whether there exists some (increasingly amorphous) connection between the forum contacts and the cause of action.

1. The First Circuit "has been recognized as the main proponent of the proximate cause standard" of relatedness. *Nowak v Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996). The test is well illustrated in *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26 (1st Cir. 1998), where the Court explained that in tort cases, "we customarily look to whether the plaintiff has established 'cause in fact (i.e., the injury would not have occurred 'but for' the defendant's forum-state activity) and legal cause (i.e., the defendant's in-state conduct gave birth to the cause of action)." *Id.* at 35 (citations omitted); *see also Swiss Am. Bank*, 274 F.3d at 622 ("[t]he relatedness inquiry for tort claims focuses on whether the defendant's in-forum conduct caused the injury or gave rise to the cause of action"); *United Elec. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) (noting that the proximate cause test requires a claimant to show that jurisdiction is premised on a contact that "form[s] an important, or [at least] material, element of proof in the plaintiff's case"). Only if this "proximate cause" test is satisfied will specific jurisdiction be found to exist in cases governed by the First Circuit's approach.

In addition to the First Circuit, a number of other federal courts require a close causal nexus between a defendant's contacts and a plaintiff's substantive claims. *See, e.g., RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1277 (7th Cir. 1997) (rejecting the use of a "loose causal connection" test and noting that in order for specific jurisdiction to exist in a breach of contract case, "past contacts involving the forum state should either bear on the substantive legal dispute between the parties or inform the court regarding the economic substance of the contract"); *see also Chew v. Dietrich*, 143

F.3d 24, 29 (2d Cir. 1998) ("[w]here the defendant has had only limited contacts with the state, it may be appropriate to say he will be subject to suit in that state only if plaintiff's injury was proximately caused by those contacts"). Clearly, there can be no personal jurisdiction over petitioners under the "proximate cause" test.

2. In contrast to this "proximate cause" approach, appellate courts in several other jurisdictions have held that this Court's relatedness requirement can be satisfied with a considerably less restrictive standard of causation that requires only that the non-resident defendant's contacts be a "cause in fact" or "but for" cause of the plaintiff's injury. The Ninth Circuit is "the most forceful defender of the 'but for' test." *Nowak*, 94 F.3d at 714. In *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991), the Ninth Circuit expressly adopted the "but for" test and held that the relatedness requirement was satisfied because, "but for" the defendant's advertising in the forum state, the plaintiff would not have taken the cruise on which she was injured. *Id.* at 386. Although *Shute* was reversed on other grounds, the Ninth Circuit has adhered to and reaffirmed the "but for" test in subsequent cases. *See Doe v. American Nat'l Red Cross*, 112 F.3d 1048, 1052 (9th Cir. 1997) (noting that "the 'but for' test is still employed in determining whether a plaintiff's injuries arose out of a defendant's forum-related activities"); *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995) ("[w]e rely on a 'but for' test to determine whether a particular claim arises out of forum-related activities and thereby satisfies the second requirement for specific jurisdiction").

The Supreme Court of Massachusetts has also adopted this "but for" approach. In *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549 (Mass. 1994), the court expressly rejected the proximate cause test, and criticized the First Circuit cases adopting that test. *Id.* at 553. Instead, the Massachusetts court cited with approval the Ninth Circuit's line of cases adopting the "but for" test. *Id.* Applying the latter test, the court held that specific jurisdiction existed over the non-

resident defendant in that case because, "*[b]ut for* the defendant's solicitation of business in Massachusetts, and its agreement to provide the plaintiff with hotel accommodations in Anaheim, California, the plaintiff would not have been injured." *Id.* at 554 (emphasis added); *see also id.* (concluding that "but for" test satisfies due process). *See also Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. Unit A Aug. 1981) (suggesting that a contract-based contact with a forum could provide support for an assertion of personal jurisdiction in a tort case where the "contractual contact is a but for causative factor for the tort since it brought the parties within tortious 'striking distance' of each other").

The "but for" test does not support jurisdiction over petitioners. That jurisdiction cannot be upheld even under the attenuated and amorphous standard to be discussed next.

3. Numerous other appellate courts have rejected any requirement of a causal nexus between the defendant's forum contacts and the cause of action, instead adopting a far more relaxed standard of relatedness. These courts hold that specific jurisdiction exists as long as there is a "substantial" or even "discernible" connection between a non-resident's contacts and the cause of action.

In *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320 (D.C.) (en banc), *cert. denied*, 530 U.S. 1270 (2000), for example, the D.C. Court of Appeals conducted a review "of nexus tests used in other jurisdictions, [and] the criticisms leveled at some of them," and declined to adopt either the "but for" or the "proximate cause" tests, instead choosing to adhere to its "substantial connection" test of relatedness. 746 A.2d at 335. The court then held that the defendant's advertising in the forum satisfied this test (despite the absence of any causal nexus between the advertising and the plaintiff's injury) because such advertising has "a *discernible relationship* to a claim by a District resident who becomes a customer in one of [defendant's] stores and is injured." *Id.* at 335-36 (emphasis added).

Similarly, in *Vons Cos., Inc. v. Seabest Foods, Inc.*, 926 P.2d 1085 (Cal. 1996), *cert. denied*, 522 U.S. 808 (1997), the Supreme Court of California held that specific jurisdiction exists when "there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim." *Id.* at 1096, 1102-12. In reaching this conclusion, the California court expressly analyzed and "rejected the proximate cause test as too narrow, and the 'but for' test as too broad and amorphous." *Id.* at 1112; *see also id.* at 1102-09. *See also CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1267 (6th Cir. 1996) (holding that specific jurisdiction requires only that defendant's contacts are "related to the operative facts of the legal controversy").

B. The Decision Below Dispenses With Any Causal Nexus Or Relationship Between The Cause Of Action And The Defendant's Forum Activities

The decision below appears to create yet a fourth category of tests for personal jurisdiction (or alternatively to expand the concept of "substantial connection" beyond any meaningful limits), because the Supreme Court of Alabama upheld the assertion of personal jurisdiction over petitioners without requiring *any* showing whatsoever of a causal or other nexus between petitioners' Alabama contacts and respondent's cause of action. Instead, the Supreme Court of Alabama virtually dispensed with the "relatedness" prong altogether, focusing its analysis on the separate question whether petitioners' actions were "purposefully directed toward the forum State." App., *infra*, 14a (citation omitted).

Concerning Shingleton, the Court rested its decision on the fact that he had visited Alabama on four occasions in his capacity as an officer or employee of Snap; the court was untroubled by the undisputed fact that none of those visits related to the claims asserted in respondent's complaint. *Id.* at 15a-16a. With respect to McInnis, the court predicated its jurisdictional holding on his *one* visit to Alabama, even though that trip was unrelated to the product at issue (and had nothing whatsoever to do with the cause of action in this

case). In the court's view, the "trip was still an act of the defendant purposefully directed toward the forum State with an intent or purpose to serve the market in the forum State." *Id.* at 17a (citation omitted). In addition, the court pointed to the allegedly culpable mental states of McInnis and Shingleton, *id.* at 16a, 17a, but those allegations likewise do not establish any relationship between petitioners' forum contacts and respondent's cause of action.

Thus, in direct conflict with the "but for" and "proximate cause" cases discussed above, the Supreme Court of Alabama upheld the exercise of personal jurisdiction over petitioners despite the absence of *any* causal nexus between the defendants' contacts with Alabama and the plaintiff's cause of action. Instead, the court held that an individual corporate employee's fortuitous and unrelated forum contacts on behalf of his corporate employer, together with some degree of alleged culpability, automatically suffice to establish the minimum contacts required by due process. The majority reached this conclusion even though the dissenting opinion argued persuasively that specific jurisdiction was unfounded because "the decedent's death did not arise from, or represent a clear, firm nexus" to McInnis's contacts with the forum. App., *infra*, 24a.

The decision below represents a new benchmark in a remarkable shift away from the minimum contacts framework set forth in this Court's precedents and employed by most federal and state appellate courts. In finding that specific jurisdiction existed despite the obvious absence of any meaningful relationship between petitioners' forum contacts and respondent's claim, the decision below effectively eliminates the "relatedness" requirement altogether, stretching the already lax "substantial relationship" test past the breaking point. There can be no question but that a different result would have been reached in this case had the court below applied the "but for" or "proximate cause" tests employed in other jurisdictions. Indeed, even a strict interpretation of the "substantial relationship" test would have required dismissal of the claims against petitioners; only the most attenuated

"relatedness" analysis (akin to that adopted by the D.C. Court of Appeals in the *Shoppers Food Warehouse* case) could justify the result reached below. Review of the decision below is therefore essential in order to establish the proper legal test for determining whether a defendant's forum contacts are sufficiently related to the plaintiff's claims to support the exercise of specific personal jurisdiction.[5]

II. The Alabama Court's Reliance On "Stream Of Commerce" And "Reprehensibility" Factors Conflicts With Decisions Of This And Other Courts

A. The Decision Below Improperly Attributes The "Stream Of Commerce" Contacts Of A Corporation To Individual Officers And Shareholders

The Alabama Supreme Court relied on the "stream of commerce" doctrine enunciated in *World-Wide* and *Asahi* in an attempt to justify the assertion of personal jurisdiction over petitioners. App., *infra*, 13a. The supreme court noted that under *Asahi*, "minimum contacts" are present if the corporation injected a product into the stream of commerce and purposefully directed its conduct at the forum state, so as to indicate an intent or purpose to serve the market in the forum state. *Id.* at 13a-14a. The court below then asked whether "the contacts of [petitioners] pass the test of *Asahi*, for sufficiency to support the exercise of personal jurisdiction over them by the Alabama courts?" *Id.* at 14a-15a.

As the pleadings and decision in this case make clear, "the product at issue in this suit was marketed throughout the United States, including the state of Alabama," by various

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[5] Petitioners note that this issue is also discussed in the petition for a writ of certiorari in *DaimlerChrysler Aktiengesellschaft v. Olson*, No. 01-929 (at pp. 28-30), although that petition is addressed primarily to the issue of "general" jurisdiction. On February 14, 2002, this Court called for a response in that case.

corporate entities, including petitioners' corporate employer and co-defendant Snap. App., *infra*, 6a (quotation marks omitted). Indeed, respondent's amended complaint expressly alleges that "[a]t all times relevant hereto, defendants Pandora Manufacturing, Inc., formerly known as Snap Products, Inc.; Snap Products, Inc.; Snap Automotive Products, Inc.; Pennzoil – Quaker State Company; and Nationwide Industries, Inc. were engaged in the business of manufacturing and marketing an aerosol tire inflator product ('fix a flat') throughout the United States, including the state of Alabama." App., *infra*, 29a ¶ 11. To be sure, petitioners are alleged to have been involved in their capacity as corporate officers or employees in some aspect of the formulation, manufacture, labeling, packaging, sale, supply, "*and/or*" distribution of the Fix-a-Flat product,[6] but it is clear that the *corporate* defendants are the only entities that allegedly engaged in all steps necessary to place the Fix-a-Flat product into the stream of commerce.

Notwithstanding this fact, the Supreme Court of Alabama held that the "stream of commerce" doctrine was applicable to petitioners, thereby attributing to petitioners the *corporate* activities of their corporate employers for purposes of the personal jurisdiction inquiry. This approach is irreconcilable with this Court's precedents, and also conflicts with decisions of other appellate courts.

In the first place, the Alabama Supreme Court's attempt to attribute the forum-related conduct of the corporate defendants to petitioners for purposes of personal jurisdiction is inconsistent with this Court's decisions in *Calder v. Jones*, 465 U.S. 783 (1984), and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), which hold that jurisdiction over a corporate employee "does not automatically follow from juris-

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[6] Respondent's amended complaint alleges that all of the named defendants "formulated, manufactured, labeled, packaged, sold, supplied *and/or* distributed" the Fix-a-Flat product. App., *infra*, 30a-31a ¶¶ 75-76 (emphasis added); *see also id.* at 31a-35a ¶¶ 81, 83.

diction over the corporation which employs him." *Keeton*, 465 U.S. at 781 n.13 (discussing *Calder*). Under *Calder* and *Keeton*, the law is clear that jurisdiction must be based on petitioners' *own contacts* with the forum; "their contacts with [the forum state] are not to be judged according to their employers' activities there." *Calder*, 465 U.S. at 790; *see also Keeton*, 465 U.S. at 781 n.13. "Each defendant's contacts with the forum State must be assessed individually" (*id.*), and the minimum contacts requirement must be separately "met as to each defendant over whom a court exercises personal jurisdiction." *Calder*, 465 U.S. at 790.

The decision below also conflicts with decisions of other appellate courts that expressly reject the type of attribution approved by the Alabama Supreme Court. In *Stuart v. Spademan*, 772 F.2d 1185 (5th Cir. 1985), for example, the plaintiffs sought to establish personal jurisdiction by attributing the forum contacts of a corporation ("SRS") to the individual defendant, Spademan, who was the corporation's president. According to the plaintiffs, the corporation's contacts with the forum, including its distribution and marketing of the product at issue, "should have been attributed to Spademan and considered along with the other purported contacts in the minimum-contacts analysis." *Id.* at 1196. The Fifth Circuit rejected plaintiffs' argument as "ill founded." *Id.* The court explained that "the general rule is that jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation . . . ." *Id.* at 1197. Because "the plaintiffs have not demonstrated that SRS is but a façade for Spademan's interests and activities to justify attributing SRS's contacts with Texas to Spademan for jurisdictional purposes," the Fifth Circuit concluded that personal jurisdiction over Spademan had not been established. *Id.* at 1198; *see also Gundle Lining Constr. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 204, 209 (5th Cir. 1996) (rejecting argument that forum contacts of corporate defendant were attributable to the individual owner/officer).

The Fourth Circuit follows a similar approach. In *Helga v. Bonney*, No. 96-1664, 1997 U.S. App. LEXIS 18179 (4th

Cir. July 21, 1997) (unpublished),[7] the court of appeals upheld the assertion of personal jurisdiction over a defendant corporation but held that the Due Process Clause precluded the exercise of personal jurisdiction over the corporation's president and stockholder. *Id.* at *2, *22-23. Although the individual defendant had occasionally visited the forum on behalf of the corporate defendant (*id.* at *6), the court concluded that he did not have sufficient minimum contacts with the forum in his individual capacity and that "any allegedly injurious acts that he committed occurred outside of [the forum]." *Id.* at *22. *See also Columbia Briargate Co. v. First Nat'l Bank In Dallas*, 713 F.2d 1052, 1064-65 (4th Cir. 1983) ("if the claim against the corporate agent rests on nothing more than that he is an officer or employee of the nonresident corporation and if any connection he had with the commission of the tort occurred without the forum state, we agree that, under sound due process principles, the nexus between the corporate agent and the forum state is too tenuous to support jurisdiction over the agent personally").

The law in other jurisdictions is to the same effect.[8] The approach taken by the Alabama Supreme Court is squarely at

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[7] The Fourth Circuit permits citation of unpublished decisions as precedent where "no published opinion . . . would serve as well." 4th Cir. R. 36(c).

[8] *See, e.g., Arkansas Rice Growers Coop. Ass'n v. Alchemy Indus., Inc.*, 797 F.2d 565, 574 (8th Cir. 1986) ("The law is clear that a corporate officer or agent who has contact with the forum state only with regard to the performance of corporate duties does not thereby become subject to jurisdiction in his or her individual capacity."); *Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 906 (1st Cir. 1980) ("The general rule is that jurisdiction over the individual officers of a corporation may not be based merely on jurisdiction over the corporation."); *Lehigh Valley Indus., Inc. v. Birenbaum*, 389 F. Supp. 798, 803-04 (S.D.N.Y.), *aff'd*, 527 F.2d 87 (2d Cir. 1975) ("It is axiomatic that jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation. That is to say, an individual's transaction of business within the state solely as an officer of a corporation does not create personal jurisdiction over that individual."); *Ruger v. Superior Court*, 118 Cal. App. 3d 427, 433 (Cal. App. 1981)

[Footnote continued on next page]

odds with this line of authority, because the decision below rests ultimately on the flawed premise that the "stream of commerce" activities of a corporate defendant can be attributed to individual corporate officer/shareholders for jurisdictional purposes.

To be sure, it may be appropriate in certain limited circumstances to treat a corporation as the mere alter ego of an individual defendant, so that due process would not be offended by attributing the corporation's contacts to the individual defendant. *See, e.g., Spademan*, 772 F.2d at 1197. But the law is clear that this exception is applicable only if the plaintiff can establish the traditional veil-piercing factors such as under capitalization, disregard of corporate form and co-mingling of funds. *See, e.g., Gundle Lining Constr. Corp.*, 85 F.3d at 208-09; *Lakota Girl Scout Council, Inc. v. Harvey Fundraising Mgmt., Inc.*, 519 F.2d 634, 638 (8th Cir. 1975).[9]

There is no allegation or evidence in this case that would justify any attempt to treat Snap as the "alter ego" of petitioners, and the Supreme Court of Alabama did not purport to rely on that theory, nor could it have done so. Instead, the court below merely attributed Snap's corporate "stream of

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("For personal jurisdiction to lie, the character, quality and nature of [the defendant corporate officer/shareholder's] activity must bear a substantial relationship to the causes of action beyond that derived solely from his official position with the corporation.").

[9] An analogous situation arises where the plaintiff seeks to establish personal jurisdiction by attributing to a non-resident parent corporation the forum activities of its corporate subsidiary. Here too, courts have consistently rejected the attempt to attribute forum contacts, absent a clear showing that the corporations failed to observe and respect the corporate form. *See, e.g., Consolidated Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) ("[i]t is well established that as long as a parent and a subsidiary are separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other"); *see also Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 218-19 (5th Cir. 2000) (applying "alter-ego" factors to determine that attribution of corporate subsidiary's forum contacts to its corporate parent was unwarranted).

commerce" contacts to petitioners without any justification other than petitioners' status as officers of the corporate defendant and shareholders of its corporate parent. The decision below is thus irreconcilable with the long line of cases rejecting attribution in the personal jurisdiction context.

The Alabama Supreme Court's reliance on the "stream of commerce" doctrine in this case also conflicts with decisions of other courts defining the scope of that doctrine. In *World-Wide Volkswagen Corp. v. Woodson*, this Court held that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a *corporation* that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 444 U.S. at 297-98 (emphasis added); *accord Burger King*, 471 U.S. at 473. Thus, the "stream of commerce" doctrine as recognized by this Court has been limited to assertions of jurisdiction over the *corporate* defendant that actually placed its products into the stream of commerce, and provides no basis for an assertion of jurisdiction over individual officers, employees, or shareholders of the corporation.

Lower courts have specifically rejected efforts to apply "stream of commerce" principles to justify assertions of personal jurisdiction over individual corporate officers. In *Ruger v. Superior Court*, for example, the plaintiff brought suit in California against the nonresident president and shareholder of a corporation that had manufactured and distributed an allegedly defective revolver. The trial court held that the individual defendant was amenable to personal jurisdiction in California because he was a "designer" of the revolver, reasoning that he "was the person who sent his product design 'into the stream of commerce knowing or having reason to know' it would reach California." 118 Cal. App. 3d at 432. The California Court of Appeal reversed. The court explained that, even if the corporate president "was the actual designer of the product in question," the trial court's assertion of jurisdiction under the stream of commerce doctrine "overreaches constitutional limits" because "[a]ll of [the cor-

porate president's] acts outside California with respect to the allegedly defective revolver were on behalf of the corporation and not in his individual capacity. It was the corporation, not [the corporate president] individually, which in fact introduced the revolver as well as its design into the stream of commerce." 118 Cal. App. 3d at 432-33.[10]

Thus, the decision below reflects an unwarranted extension of the "stream of commerce" doctrine and an improper use of attribution principles to justify the assertion of personal jurisdiction over petitioners. Review by this Court is necessary to address the conflict between the decision below and the numerous authorities cited above, and to make clear that personal jurisdiction over corporate shareholders or employees must be assessed solely on the basis of each separate defendant's forum-related activities.

B. The Decision Below Erroneously Creates A "Reprehensibility" Exception To The "Minimum Contacts" Requirement

The decision below also warrants review because it improperly displaces this Court's "minimum contacts" framework with a new test based on a subjective assessment of the reprehensibility of a defendant's alleged conduct. In the specific jurisdiction context, this Court has held that the "fair warning" required by due process is satisfied only when a defendant has "purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472 (quotation marks omitted). In stark contrast to that statement of the "minimum contacts" test, the court below held that the "reprehensibility" of the defendants' al-

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[10] *Accord, e.g., Blaschka-Mansfeldt v. Vitek, Inc.*, No. C2-89-1114, 1989 WL 131525 (Minn. App. Nov. 7, 1989) (unpublished) (although corporate defendant's act of manufacturing product and placing it into stream of commerce may establish personal jurisdiction over the corporation, stream of commerce argument was insufficient to establish jurisdiction over individual corporate officer who had developed the product).

leged acts could make up for what would otherwise be an *absence* of the requisite minimum contacts: "*The reprehensible extent of McInnis's culpability . . . increases the importance of McInnis's contacts with Alabama enough that* [the requirements of due process are satisfied]." App., *infra*, 17a (emphasis added). As the dissent cogently recognized, "[t]he majority opinion improperly displaces the long-standing constitutional requirement of 'minimum contacts' with a new, sliding scale based upon subjective views of the reprehensibility of the defendant's alleged conduct." *Id.* at 22a.

The Alabama court's holding that the subjective reprehensibility of a defendant's alleged conduct can enhance the constitutional significance of otherwise insufficient contacts is directly contrary to this Court's precedents. As this Court has made clear, "minimum contacts" are indeed the irreducible constitutional minimum, and the only factors relevant to the "minimum contacts" inquiry are whether (1) the nonresident defendant "'purposefully directed his activities at residents of the forum," and (2) "the litigation results from alleged injuries that 'arise out of or relate to' those activities" (*Burger King*, 471 U.S. at 472 (citations omitted))—factors that decidedly do *not* include the perceived "reprehensibility" of the defendant's alleged acts.

Moreover, even assuming *arguendo* that an examination of "reprehensibility" might be permissible as part of the third prong of the due process test, which asks whether the exercise of jurisdiction would be consistent with "fair play and substantial justice" (*Burger King*, 471 U.S. at 476), the approach followed by the court below would still be indefensible. Numerous appellate courts have held that the "fair play and substantial justice" inquiry is irrelevant unless and until the court first concludes "that a defendant purposefully established minimum contacts within the forum State . . . ." *Id.* As the Second Circuit held in *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir. 1996), "[a] reviewing court must *first* examine the defendant's contacts with the forum [and] [i]f the same do not exist in sufficient abundance, that is, if the constitutionally necessary

first-tier minimum is lacking, *the inquiry ends*." *Id.* at 568 (quotations and citations omitted; emphasis added).[11] At best, the Alabama Supreme Court's contrary reasoning reflects a distinctly minority view. *Cf. Prejean*, 652 F.2d at 1269 (forum's interest in adjudicating dispute "can serve to enhance the contacts with the forum to a quality that justifies the assertion of jurisdiction").

The conflict between the ruling below and the decisions of this and other courts on this issue provides ample justification for this Court's review. Petitioners respectfully submit that certiorari should be granted so that this Court can make clear that, as the dissent below observed, "*in personam* jurisdiction turns on the level of contacts, not the severity of [alleged] wrongdoing." App., *infra*, 25a.

C. The Decision Below Improperly Collapses The Distinction Between Specific And General Jurisdiction

Finally, review by this Court is also necessary because the decision below effectively collapses the distinction between general and specific jurisdiction by eviscerating this Court's relatedness requirement. The relatedness inquiry guarantees a non-resident defendant the fundamental fairness required by due process by prohibiting the exercise of personal jurisdiction in those cases not "arising out of or relating to" the defendant's forum activities, unless the defendant has

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[11] *Accord, e.g., Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Prods. Co.*, 75 F.3d 147, 150-51 (3d Cir. 1996) ("*if* 'minimum contacts' are shown, jurisdiction may be exercised where . . . to do so would comport with 'traditional notions of fair play and substantial justice'") (emphasis added); *Felch v. Transportes Lar-Mex SA DE CV*, 92 F.3d 320, 329 (5th Cir. 1996) ("[a]s Felch failed to establish sufficient 'minimum contacts' with Texas, we need not address whether the exercise of personal jurisdiction in this case would offend traditional notions of fair play and substantial justice"); *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270-71 (9th Cir. 1995) ("[w]e do not discuss the 'reasonableness' criterion, because . . . it is plain that the first two criteria are not satisfied").

the type of "continuous and systematic" contacts required for the exercise of general jurisdiction. *Helicopteros,* 466 U.S. at 414 nn.8-9; *see also Swiss Am. Bank, Ltd.*, 274 F.3d at 623 ("[t]he relatedness inquiry separates general jurisdiction from specific jurisdiction cases"); *Shute*, 897 F.2d at 385 (describing "the basic function of the 'arising out of' requirement" as "preserv[ing] the essential distinction between general and specific jurisdiction").

The decision below essentially combines the relatedness requirement and the purposeful availment requirement of *Burger King* into a single inquiry, but as other courts have correctly recognized, "the inquiries are different." *Swiss Am. Bank*, 274 F.3d at 623. The relatedness prong "ensures fundamental fairness by protecting a defendant from being hauled into an out-of-state forum based on a single contact that is wholly unrelated to the suit at issue," *id.*, whereas the purposeful availment prong protects non-resident defendants in those instances where a cause of action arises from or relates to an otherwise random or fortuitous contact which could not reasonably provide "fair warning" that such activity might "subject them to the jurisdiction of a foreign sovereign." *Burger King*, 471 U.S. at 472, quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977).

Satisfied that petitioners' contacts evidenced purposeful availment of the forum State and therefore "pass[ed] the test of *Asahi*," the court below upheld jurisdiction over petitioners despite the absence of a causal nexus (or indeed any relationship) between petitioners' forum contacts and respondent's cause of action. If the rule of law put forward by the court below carries the day, individuals and corporations will be subjected to the jurisdiction of distant and disparate forums on a showing of as little as a single act purposefully directed at the forum state, even if that act has no relationship to the cause of action. Such a result clearly contravenes the settled principles governing personal jurisdiction enunciated by this Court. Review should be granted to preserve the due process protections that properly constrain the exercise of personal jurisdiction.

III. The Questions Presented Are Of Recurring And Substantial Importance

As the foregoing discussion demonstrates, the question of relatedness arises with considerable frequency, and is of central importance to the personal jurisdiction inquiry. The exercise of specific jurisdiction is appropriate only where a prospective litigant has "fair warning" that certain conduct may subject him or her to suit in a particular forum, and it is the relatedness inquiry that serves this essential function. *Burger King*, 471 U.S. at 472. Given its profound importance to the due process framework, application of the relatedness inquiry should be clear and consistent. *See World-Wide*, 444 U.S. at 297 (due process inquiry should "give[] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where conduct will and will not render them liable to suit"). Unfortunately, the conflicts in approaches among the lower state and federal courts have led to the opposite result, as the decision below amply demonstrates.

This Court has already recognized the importance of establishing the proper legal test for relatedness in specific jurisdiction cases. Indeed, more than a decade has passed since this Court granted review in *Carnival Cruise Lines* on the same question presented in this petition. Since that time, the conflict over the relatedness requirement has only intensified, as some courts have dispensed altogether with tests based on causality, instead favoring an even less defined notion of relatedness based on a mere "discernible relationship" between a defendant's contacts and the plaintiff's claim. This troubling result concerning a fundamental liberty interest is of great importance and compels review by this Court.

If allowed to stand, the decision below will exacerbate the existing conflicts that divide the lower courts and compound the arbitrariness and unfairness produced by the lack of clarity and certainty in this important area of the law. The Supreme Court of Alabama's decision to engraft a subjective "reprehensibility" inquiry onto the "minimum contacts" test,

its attribution of corporate contacts to individual corporate officers and shareholders, and its evisceration of the "relatedness" prong are the latest, and most extreme, examples of the widening division of authority in this area. The necessity for this Court's review is stark and apparent, and this case provides an excellent vehicle for the Court's consideration of the full range of issues raised by the existing conflicts over the proper test for assessing claims of specific jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 4, 2002

APPENDIX

APPENDIX A

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2001-2002

1990045

Ex parte Sam McInnis, Michael Borka, and Tim Shingleton

PETITION FOR WRIT OF MANDAMUS

(Re: Pamela Alice Little Daniel, as administratrix of the estate of Joe Ed Daniel, deceased

v.

Pandora Manufacturing, Inc., et al.)

(Baldwin Circuit Court, CV-98-1113)

1990659

Ex parte Pamela Alice Little Daniel, as administratrix of the estate of Joe Ed Daniel, deceased

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(Re: Pamela Alice Little Daniel, as administratrix of the estate of Joe Ed Daniel, deceased

v.

Pandora Manufacturing, Inc., et al.)

(Baldwin Circuit Court, CV-98-1113)

JOHNSTONE, Justice.

Petitioners-defendants Sam McInnis, Michael Borka, and Tim Shingleton petition this Court for a writ of mandamus to direct the trial judge to vacate her order denying these defendants' Rule 12(b)(2), Ala. R. Civ. P., motions to dismiss for want of personal jurisdiction and to direct her to enter an order granting these motions. We deny mandamus relief to the defendants McInnis and Shingleton but grant mandamus relief to the defendant Borka.

Anticipating the possibility that this Court might grant the writ of mandamus sought by the petitioner-defendants, the plaintiff Pamela Alice Little Daniel has, filed her own petition for a writ of mandamus to direct the trial judge to vacate an order granting these defendants' motions to strike certain evidentiary materials submitted by the plaintiff in opposition to these defendants' Rule 12(b)(2) motions to dismiss. The plaintiff asks that, if 'we grant these defendants relief by directing the trial judge to vacate her order denying these defendants' Rule 12(b)(2) motions, we also direct the trial judge to consider the plaintiff's evidentiary materials in a further consideration of these defendants' Rule 12(b)(2) motions. The plaintiff's petition for a writ of mandamus is moot in part and denied in part.

Pamela Alice Little Daniel, as the administratrix of her husband's estate, sued Sam McInnis, Michael Borka, Tim Shingleton, Snap Products, Inc., Snap Automotive Products, Inc., and other foreign corporations for tortiously formulating, manufacturing, labeling, and distributing a product named "Fix-a-Flat Non-Explosive Formula," which, the

plaintiff alleges, killed her husband Joe Ed Daniel, and for thereby wrongfully causing his death. Each of the defendants McInnis, Borka, and Shingleton, all residents of North Carolina, filed a Rule l2(b)(2), Ala. R. Civ. P., motion to dismiss the claims against him for lack of personal jurisdiction on the ground that he did "not have sufficient or minimal personal contacts to confer personal jurisdiction over him, individually or as an officer of Snap, in the courts of Alabama in this action"; and each of these defendants filed an affidavit in support of his motion to dismiss. Thereafter, the plaintiff filed an amended complaint, and the defendant Shingleton filed a supplemental affidavit. The parties agreed that these three defendants could refrain from answering the plaintiff's complaint as amended until after these defendants' Rule 12(b)(2) motions to dismiss were finally decided.

In hearing and denying these three defendants' Rule 12(b)(2) motions, the trial judge considered only those facts alleged in the plaintiff's complaint and amended complaint and those facts' sworn in the four affidavits filed by the defendants. The trial judge refused to consider the evidentiary materials submitted by the plaintiff.

In considering a Rule 12(b)(2), Ala. R. Civ. P., motion to dismiss for want of personal jurisdiction, a court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits, *Robinson v. Giamarco & Bill, P.C.*, 74 F.3d 253 (11th Cir. 1996), and *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F. 2d 829 (11th Cir. 1990), and "where the plaintiff's complaint and the defendant's affidavits conflict, the court must construe all reasonable inferences in favor of the plaintiff." *Robinson*, 74 F.3d at 255 (quoting *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990). "For purposes of this appeal [on the issue of *in personam* jurisdiction] the facts as alleged by the . . . plaintiff will be considered in a light most favorable to him [or her]." *Duke v. Young*, 496 So. 2d 37, 38 (Ala. 1986).

A denial of a Rule 12(b)(2) motion to dismiss for want of personal jurisdiction is interlocutory and preliminary only.

After such a denial, the continuation of personal jurisdiction over a defendant who appropriately persists in challenging it in the defendant's answer to the complaint and by motion for summary judgment or at trial depends on the introduction of substantial evidence to prove the plaintiff's jurisdictional allegations, in the plaintiff's complaint. *Hunt v. BP Exploration Co. (Libya) Ltd.*, 492 F. Supp. 885, 895 (N.D. Tex. 1980); *Speir v. Robert C. Herd & Co.*, 189 F. Supp. 436 (D. Md. 1960); Champ Lyons, Jr., *Alabama Rules of Civil Procedure Annotated* § 12.3 (3d ed. 1996); and Wright and Miller, *Federal Practice and Procedure: Civil* § 1351 at 568 (1969). *See also Ex parte Sekeres*, 646 So. 2d 640, 642 (Ala. 1994) (Houston, J., concurring specially).

A writ of mandamus is an extraordinary remedy which requires a showing of (a) a clear legal right in the petitioner to the order sought, (b) an imperative duty on the respondent to perform, accompanied by a refusal to do so, (c) the lack of another adequate remedy, and (d) the properly invoked jurisdiction of the court. *Ex parte Bruner*, 749 So. 2d 437, 439 (Ala. 1999). "Because the order of the trial court was interlocutory, a writ of mandamus is an appropriate remedy for the petitioners in this case." *Ex parte Paul Maclean Land Servs., Inc.*, 613 So. 2d 1284, 1286 (Ala. 1993).

"A corporate agent who personally participates, albeit in his or her capacity as such agent, in a tort is personally liable for the tort." *Sieber v. Campbell*, [Ms. 1991706, July 13, 2001] ___ So. 2d ___, ___ (Ala. 2001). *See also Bethel v. Thorn*, 757 So. 2d 1154, 1158 (Ala. 1999), and *Ex parte Charles Bell Pontiac-Buick-Cadillac-GMC*, 496 So. 2d 774, 775 (Ala. 1986). Likewise, corporate agent status does not insulate the agent personally from his or her jurisdictional contacts with a state or from personal jurisdiction in the state. *Calder v. Jones*, 465 U.S. 783, 790 (1984); *Sieber*, *supra*; *Sudduth v. Howard*, 646 So. 2d 664, 668 (Ala. 1994); and *Duke*, 496 So. 2d at 40.

The plaintiff's amended complaint pleads the manner of Mr. Daniel's death and pleads the personal participation of the defendants McInnis, Borka, and Shingleton in the formu-

lation, manufacture, labeling, and distribution of the product which killed Mr. Daniel. These three defendants' own affidavits supply the remaining facts necessary to an analysis of the issue of the personal jurisdiction of the Alabama court over them.

On June 4, 1997, Mr. Daniel was killed by the explosion of Snap Fix-a-Flat Non-Explosive Formula ("the product") inside a motor grader tire mounted on its rim. He had been welding a small lug to the rim when the heat of the welding ignited the product, and the consequent explosion propelled fragments of the tire and components of the rim assembly into him and thereby decapitated him. The tire had previously been inflated with two cans of the product.

At the time the two cans of the product were manufactured, labeled, and distributed, a transferable label system was commonly available, known and used in the tire-inflator industry. Typically, a removable warning label would be affixed to the tire-inflator can with instructions to peel the label off the can and to transfer the label to whatever tire was inflated with the contents of the can. The product which killed Mr. Daniel was not manufactured or distributed with any such label, and consequently the tire which exploded had not been labeled with such a warning, even though the propellant contained in the product was explosive *dimethyl ether ("DME")*, known at the time to have caused injuries and deaths like Mr. Daniel's. (The name of the propellant dimethyl ether bears remembering because its explosive nature is important to the rationale of this case.) Rather, the cans used to inflate the tire involved in Mr. Daniel's death were marked "Fix-a-Flat NON-EXPLOSIVE FORMULA." (Capitalization in original.) The pleadings allege that "Mr. Daniel, and the individuals who previously purchased and injected the 'fix a flat NON-EXPLOSIVE FORMULA' tire inflator product into the subject motor grader tire, were disarmed by the product's labeling into believing the motor grader tire did not have to be removed from the rim before the tacking procedure was performed."

The pleadings allege that, "[p]rior to June 4, 1997," McInnis, Borka, and Shingleton (among other defendants) "formulated, manufactured, labeled, packaged, sold, supplied and/or distributed the 'fix a flat NON-EXPLOSIVE FORMULA' tire inflator/sealant involved in the accident made the basis of this suit." The ostensible corporate source of the product was Snap Products, Inc. The product was marketed "throughout the United States, including the state of Alabama." In April 1995, over two years before Mr. Daniel's death, the defendants McInnis, Borka, and Shingleton formed Snap *Automotive* Products, Inc., and purchased Snap Products, Inc., from its then owners, the "Bishop Estate" in Hawaii. "Defendant Snap Automotive Products, Inc. is a Delaware corporation with its principal residence located in North Carolina."

> "57. At the time defendants McInnis, Borka, and Shingleton formed Snap Automotive Products, Inc., and bought Snap Products, Inc. from the 'Bishop Estate,' these defendants knew the *DME [(dimethyl ether)]* 'fix a flat' product was explosive and they had no intention to recall, or relabel, the product regarding flammability/explosivity risks."

(Amended complaint, emphasis added.) Between the time McInnis, Borka, and Shingleton formed Snap Automotive Products, Inc., to buy Snap Products, Inc., and the time the product killed Mr. Daniel, these three defendants learned of three intervening explosions of the product that injured three other men the same way Mr. Daniel would be killed. Notwithstanding this knowledge, McInnis, Borka, and Shingleton still chose not to recall or to relabel the product.

The pleadings detail extensive facts of the *defendant McInnis's* personal knowledge, attitude, and acts in the formulation, manufacture, labeling, and distribution of the product. For some five years before he, Borka, and Shingleton formed Snap Automotive Products, Inc., and bought Snap Products, Inc., McInnis had participated in the evolution of tire inflators in affiliation with Snap Products, Inc., and an-

other defendant, Nationwide Industries, Inc. For Nationwide, McInnis had marketed a tire inflator containing hydrochlorofluorocarbon ("HCFC"), a truly nonexplosive propellant that replaced a previously used propane/butane propellant, which had proved explosive. While McInnis was marketing the tire inflator containing nonexplosive HCFC, he criticized a competitor for endangering the public by using *explosive DME* as a propellant. Yet when the federal government prohibited the use of HCFC because it depleted the ozone layer of the atmosphere of the earth, *McInnis promoted and marketed a change to the DME propellant he already knew to be explosive.* In deciding to change to the explosive DME, McInnis rejected still another alternative, a nonexplosive propellant called 134A, as too expensive. At the time McInnis promoted the change from the nonexplosive but ozone-depleting HCFC to the *explosive DME*, the competitor had recalled its *DME* tire inflator *because of its explosion hazard. Yet McInnis rejected the use of transferable warning labels on the explosive DME product he was marketing, and marketed the DME product as nonexplosive, because he knew it would sell better that way.*

During the evolution of the product, *McInnis* ordered and received *tests* which proved that DME *posed an explosion hazard.* He also learned of tests to the same effect obtained by others. In March 1994 *McInnis acknowledged*, in the words of the pleadings, "*that the DME 'fix a flat' product was, in fact, explosive* and may have to be recalled, which would cost millions of dollars, *could cost Mr. McInnis his job*, or could put Snap out of business." (Emphasis added.) In March and April 1994, responding to criticisms that the Snap Fix-a-Flat NON-EXPLOSIVE FORMULA posed an explosion hazard, McInnis defended his marketing of the product by explaining that Snap carried $25,000,000 in liability insurance, which would cover any losses.

The scenarios for the welding explosion injuries from tire inflators containing explosive propellants were essentially the same. A mechanic or other consumer, unaware of the explosion hazard, would perform some. welding on a rim

without removing from the rim a tire inflated with the inflator including the explosive propellant; the heat from the welding would ignite the propellant; and the consequent explosion, or tire and rim parts driven by it, would injure the user. Such explosion injuries occurred both before and after McInnis, Borka, Shingleton formed Snap Automotive Products, Inc., to buy Snap Products, Inc. Yet *McInnis, with knowledge of these explosion injuries, steadfastly rejected the transferable warning labels and marketed the explosive DME product as nonexplosive and safe in his affiliations with Nationwide, Snap Products, Inc., and Snap Automotive Products, Inc.*

While the affidavits filed by McInnis and Shingleton deny certain kinds of contacts with the state of Alabama, the affidavits of Shingleton and McInnis do reveal and admit certain other contacts. Paragraph 5 of *Shingleton's first affidavit* reads:

> "5. *On four occasions* between 1992 to [sic] early 1995, *I traveled to Alabama* on the business of Snap. Sometime between 1992 and 1994, I traveled twice on behalf of Snap to Tuscaloosa, Alabama, to visit a potential customer, Carport. Besides my travel time, I spent approximately one hour per visit. *Carport eventually purchased some of Snap's product line, but not the Fix-a-Flat product.* In the [sic] late 1994 or early 1995, I traveled to Birmingham, Alabama, to visit a potential customer, Big B Drugs. My meeting with Big B Drugs lasted approximately one hour. Finally, some time prior to 1995, I traveled to the Mobile, Alabama, area and visited with a manufacturer's representative to several local warehouse distributors. My visits with these distributors would have amounted to a total of less than four hours of time."

Paragraphs 2 and 3 of *Shingleton's second affidavit* read:

"2. In my prior affidavit in this case, I referenced four isolated visits to Alabama. My short trip to Birmingham was to Big B Drugs. This visit focused on *Snap Products' entire seventy plus products line, not specifically* Fix-A-Flat, and did not *directly* result in an order for Fix-A-Flat. My one-day trip to the Mobile area was to several small distributors/retailers again relating to *Snap Products' entire product line*, not specifically to the Fix-A-Flat product.

"3. None of my four trips to Alabama dealt with the manufacture, labeling, testing, or formulation of Fix-A-Flat and none of the brief trips resulted *directly* in the sale of Fix-A-Flat. In fact, I did not have any involvement in the formulation, testing or the labeling of Fix-A-Flat during the 1993 and 1994 period when the third generation formula was developed." (Emphasis added.)

Paragraph 5 of *McInnis's affidavit* reads:

"5. In 1994 or 1995, I traveled on behalf of Snap to Tuscaloosa, Alabama, to visit *an existing customer, Carport.* At that time, *Carport already purchased one or two Snap products but not the Fix-A-Flat product* at issue in this lawsuit. The intent of my visit was to convince Carport to enter into a blanket purchase arrangement whereby Carport would carry *Snap's entire entry-level line of products. The entry-level line did not include Fix-A-Flat* product at issue in this lawsuit. My visit was unsuccessful, as Carport declined to enter into any such arrangement, and Carport purchased no *new* Snap products as a result of my visit." (Emphasis added.)

Paragraphs 3, 4, and 5 of Borka's affidavit read:

> "3. I am a North Carolina resident, and have lived in North Carolina with my family since 1993. I have never lived in Alabama or been a resident of Alabama.
>
> "4. *I have never been to the state of Alabama on either personal or business matters.* I do not now have nor have I ever had any contact with or interest in the state of Alabama, whether personal or business-related.
>
> "5. I have never owned property or real estate in Alabama. I have never been a litigant in the courts of Alabama or availed myself of the courts of Alabama. I have never received any benefits of any kind from the State of Alabama."

The affidavits of these three defendants also reveal their respective offices with Snap Products, Inc. From September 1993 to March 1995, *McInnis* was "Vice-President of Sales"; and, from April 1995 to November 1997, he was "Chief Executive Officer." From April 1995 to November 1997, *Borka* was "Chief Financial Officer." From September 1993 to March 1995, *Shingleton* was "a Regional Sales Manager or Vice-President of Sales"; and, from April 1995 to November 1997, Shingleton was "President of Operations." The plaintiff's pleadings allege that *the product which killed Mr. Daniel produced approximately half of the income of Snap Products, Inc.*, more income than any of its other products produced.

Rule 4.2, Ala. R. Civ. P., extends the personal jurisdiction of Alabama courts to the limit of due process under the federal and state constitutions. *Sieber*, *supra*. *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Duke*, *supra*; *Brooks v. Inlow*, 453 So. 2d 349 (Ala. 1984); and *Alabama Waterproofing Co. v. Hanby*, 431 So. 2d 141, 144-146 (Ala. 1983). "A physical presence in Alabama is not a prerequisite to personal jurisdiction over a

nonresident." Sieber, ___ So. 2d at ___. *See also Sudduth*, 646 So. 2d at 667.

> """What is required is that the out-of-state resident have 'some minimum contacts with this state [so that], under the circumstances, *it is fair and reasonable to require the person to come to this state to defend an action.*' Rule 4.2(a)(2)(I), Ala. R. Civ. P. [(Emphasis added.)]
>
> """"[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'""" *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). Alabama's long-arm statute (Rule 4.2, Ala. R. Civ. P.) has been interpreted by this Court to extend the jurisdiction of Alabama courts to the permissible limits of due process. *DeSotacho, Inc. v. Valnit Industries, Inc.*, 350 So. 2d 447 (Ala. 1977), *Duke v. Young*, 496 So. 2d 37 (Ala. 1986)
>
> """*Alabama's long-arm procedure for service of process is not limited to 'rigid transactional categories' or subject to a mechanical formula. Alabama Waterproofing Co. v. Hanby*, 431 So. 2d 141 (Ala. 1983). Instead, the relevant facts and attendant circumstances must be examined and the relationship among the defendant, the forum, and the litigation analyzed to determine if the defendant has sufficient 'minimum contacts' so that 'the maintenance of the suit does not offend "tradi-

> tional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington.*" [(Emphasis added.)]

"'A relevant factor in a due process analysis is *whether the defendant should have reasonably anticipated that he would be sued in the forum state.* [(Emphasis added.)] In *Dillon Equities, supra,* at 462, this Court, quoting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) noted:

> """"The foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum state are such that *he should reasonably anticipate being haled into court there.*' (Citations omitted.)[(Emphasis added.)]"""

Sudduth, 646 So. 2d at 667 (quoting *Knowles v. Modglin,* 553 So. 2d 563, 565-66 (Ala. 1989)). Rule 4.2(a) provides, in pertinent part:

> "(2) *Sufficient Contacts.* A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's
>
> "....
>
> "(D) causing tortious injury or damage in this state by an act or omission outside of this state if the person regularly does or solicits business, or engages in any other persistent course of conduct or derives substantial revenues from goods used or consumed or services rendered in this state;
>
> "....
>
> "(I.) *otherwise having some minimum contacts with this state and, under the circumstances, it is fair and reasonable to require*

> *the person to come to this state to defend an action.* The minimum contacts referred to in this subdivision (I) shall be deemed sufficient, *notwithstanding a failure to satisfy the requirements of subdivisions (A)-(H) of this subsection (2)*, so long as the prosecution of the action against a person in this state is not inconsistent with the constitution of this state or the Constitution of the United States."

(Emphasis added.) In *World-Wide Volkswagen Corp.*, 444 U.S. at 297-98 (1980), the Supreme Court stated that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." In *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), the Supreme Court *clarified the "stream of commerce" doctrine* of personal jurisdiction:

> "Since *World-Wide Volkswagen*, lower courts have been confronted with cases in which the defendant acted by placing a product in the stream of commerce, and the stream of commerce *eventually* swept defendant's product into the forum State, *but the defendant did nothing else to purposefully avail itself of the market in the forum State.* Some Courts have understood the Due Process Clause, as interpreted in *World-Wide Volkswagen*, to allow an exercise of personal jurisdiction to be based on no more than the defendant's act of placing the product in the stream of commerce. Other courts have understood the Due Process Clause and the above-quoted language in *World-Wide Volkswagen* to require *the action of the defendant to be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce.*

"....

> "*We now find this latter position to be consonant with the requirements of due process.* The 'substantial connection,' [*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)], between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State. Burger King, supra*, 471 U.S., at 476 .... The placement of a product into the stream of commerce, without more, is not *an act of the defendant purposefully directed toward the forum State.* Additional conduct of the defendant may indicate *an intent or purpose to serve the market in the forum* State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or *marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.* But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."

480 U.S. at 110-12 (some emphasis original; some emphasis added). "Whether sufficient contacts exist so that the maintenance of a suit in Alabama does not offend reasonableness and fair play is to be determined on a case by case basis." *Bryant v. Ceat S.p.A.*, 406 So. 2d 376, 377 (Ala. 1981), *cert. denied*, 456 U.S. 944 (1982)

Do the contacts of the defendants McInnis, Borka, and Shingleton pass the test of *Asahi, supra*, for sufficiency to

support the exercise of personal jurisdiction over them by the Alabama courts? To what extent did they engage in actions "purposefully directed toward the forum State" so as to "indicate an intent or purpose to serve the market in the forum State"? *Asahi*, 480 U.S. at 112.

Do the contacts of these defendants pass the tests of *Sudduth*, *supra*, for sufficiency to support the exercise of personal jurisdiction by the Alabama courts? To what extent is it "fair and reasonable to require [these defendants] to come to this state to defend an action"? *Sudduth*, 646 So. 2d at 667, and Rule 4.2(a)(2)(I). To what extent should these defendants "reasonably [have] anticipate[d] being haled into court" in Alabama? *Sudduth*, 646 So. 2d at 667.

The plaintiff's pleadings expressly allege that each of these defendants, among other defendants, "formulated, manufactured, labeled, packaged, sold, supplied and/or distributed the 'fix a flat NON-EXPLOSIVE FORMULA' tire inflator/sealant involved in the accident made the basis of this suit." The plaintiff's pleadings also allege that each of these defendants knew of the explosiveness of the product, knew of the three actual injuries caused by explosions of the product in 1995 and 1996 before Mr. Daniel's death in 1997, and participated together in the decision not to recall or to relabel the product. The pleadings, however, also reveal a greater degree of culpable participation by McInnis than by Borka or Shingleton. Likewise, uncontroverted portions of these three defendants' respective affidavits establish differences among the three in their respective degrees of physical presence in Alabama. Therefore, even though a "physical presence in Alabama is not a prerequisite to personal jurisdiction over a nonresident," *Sieber*, ___ So. 2d at ___, we will analyze the amenability of each of these defendants to personal jurisdiction in Alabama seriatim, in the order of decreasing degrees of physical presence in Alabama. *See also Sudduth*, 646 So. 2d at 667.

Shingleton visited Alabama four times "between 1992 . . . [and] early 1995" to develop a market here for not only the product which killed Mr. Daniel, but also "Snap Prod-

ucts' entire seventy plus products line." He successfully enlisted Carport as a retailer of "some of Snap's product line, but not the Fix-a-Flat product." Likewise he successfully enlisted Big B Drugs as a retailer for the entire product line, including Fix-a-Flat. He also visited "a manufacturer's representative to several local warehouse distributors" and "several small distributors/retailers again relating to Snap Products' entire product line." While Shingleton's affidavit states that "[n]one of my four trips to Alabama dealt with the manufacture, labeling, testing, 'or formulation of Fix-A-Flat" and that he "did not have any involvement in the formulation, testing or the labeling of Fix-A-Flat during the 1993 and 1994 period when the third generation formula was developed," Shingleton does not dispute the plaintiff's allegations that Shingleton knew of the explosiveness of the Fix-A-Flat product, that he knew of the actual explosions which injured three men other than Mr. Daniel in 1995 and 1996, and that he participated in the decision thereafter not to recall or to relabel the product. Likewise, Shingleton does not dispute the plaintiff's allegation that Shingleton manufactured the product. He simply denies that his trips to Alabama "dealt with" the manufacture and denies that he had "any involvement in the labeling of Fix-A-Flat during the 1993 and 1994 period."

These facts, thus established for the purpose of judging Shingleton's Rule 12(b)(2) motion to dismiss for want of personal jurisdiction, pass the tests of *Asahi* and *Sudduth*, *supra*. Shingleton's actions were "purposefully directed toward the forum State" so as to "indicate an intent or purpose to serve the market in the forum State." *Asahi*, 480 U.S. at 112. "[I]t is fair and reasonable to require [Shingleton] to come to this state to defend [this] action." *Sudduth*, 645 So. 2d at 667, and Rule 4.2(a)(2)(I). And Shingleton "should [have] reasonably anticipate[d] being haled into court" in Alabama. *Id.* Therefore, the trial judge correctly denied Shingleton's motion to dismiss; and Shingleton has not established a right to mandamus relief.

McInnis admits in his affidavit that he traveled to Alabama to convince "an *existing* customer, Carport" (emphasis added), "to carry Snap's entire entry-level line of products," which "did not include Fix-A-Flat." McInnis's claim that this trip was unsuccessful does not eliminate the importance of the trip as a contact between him and Alabama, The trip was still "an act of the defendant purposefully directed toward the forum State" with "an intent or purpose to serve the market in the forum State." *Asahi*, 480 U.S. at 112. Had the trip succeeded, it would have promoted not only the particular products accepted by Carport but also the brand name itself, and the enhancement of the brand name would have promoted the sales of the explosive Snap Fix-A-Flat product being sold by other retailers.

McInnis's affidavit does not deny any of the substantive allegations of the plaintiff's pleadings. McInnis does not deny that he formulated, manufactured, labeled, and distributed the fatal product. He does not deny that he knew and suppressed its explosiveness. He does not deny that he used an explosive propellant instead of a nonexplosive propellant simply to save money. He does not deny that he learned of the three injuries caused by explosions of the product in 1995 and 1996 similar to the explosion which would kill Mr. Daniel in 1997. Finally, McInnis does not deny that, with full knowledge of the explosiveness of the product and the injuries from it, he decided not to recall or to relabel the product.

The reprehensible extent of McInnis's culpability, as established by the pleadings for the limited purpose of deciding his Rule 12(b)(2) motion to dismiss, increases the importance of McInnis's contacts with Alabama enough that "it is fair and reasonable to require [him] to come to this state to defend an action," *Sudduth*, 646 So. 2d at 667, and Rule 4.2(a)(2)(I), and enough that "he should reasonably [have] anticipat[ed] being haled into court" here, *Sudduth*, 645 So. 2d at 667. Therefore, the trial court correctly denied McInnis's motion to dismiss, and McInnis has not established a right to mandamus relief.

Whether the plaintiff can prove her allegations against the defendants McInnis and Shingleton and can thereby maintain personal jurisdiction at the stages of the litigation that require proof as distinguished from pleadings remains to be seen. But Justice Houston's special concurrence in the procedurally analogous case of *Ex parte Sekeres*, 646 So. 2d at 642, is appropriate here:

> "A writ of mandamus will not be issued unless there is a clear showing of error on the part of the trial court. *Ex parte Rosebusch, Inc.*, 558 So. 2d 356 (Ala. 1990). Having studied the complaint; the motion to dismiss, with the attached affidavit of Charles E. Sekeres; and the deposition of Sekeres offered in the case of *Allen v. Physicians Weight Loss Centers* (CV-89-001969, Mobile Circuit Court), I cannot hold at this stage of the proceeding that the petitioner has made a clear showing of error on the part of the trial court (*Ex parte Rosebusch, Inc.*) or that the petitioner has a clear and undisputable right to the relief sought. It may well be that *in personam* jurisdiction of Sekeres exceeds the limits of due process, but I cannot say, based upon the record now before this Court, that the trial court clearly erred in denying the motion to dismiss or that Sekeres has a' clear and undisputable right to be dismissed from this action."

Without contradiction, the affidavit of the defendant Borka denies any physical presence in Alabama whatsoever. The plaintiff's pleadings do not allege that either Shingleton or McInnis was acting as Borka's agent or partner when either traveled into Alabama. The plaintiff also does not expressly allege that Borka shared or participated in the intentions and purposes of Shingleton or McInnis to develop a market specifically in the state of Alabama. Likewise, while the last cause of action in the plaintiff's amended complaint

expressly alleges that McInnis, Borka, and Shingleton, as well as other defendants, conspired together in most aspects of their alleged tortious conduct, these pleadings do not allege that they conspired together in marketing the product within Alabama.

> "'Bald speculation' or a 'conclusionary statement' that individuals are co-conspirators is insufficient to establish personal jurisdiction under a conspiracy theory. *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 787 (D.C. Cir. 1983), *cert. denied*, 457 U.S. 1210, 104 S.Ct. 2399, 81 L.Ed.2d 355 (1984). Instead, the plaintiff must plead with particularity 'the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy.' *Dooley v. United Technologies Corp.*, 786 F.Supp. 65, 78 (D.D.C. 1992) (citing *Naartex*, 722 F.2d at 787 and *First Chicago Int'l v. United Exchange Co., Ltd.*, 836 F.2d 1375, 1378-79 (D.C. Cir. 1988))."

Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1031 (D.C. Cir. 1997). Absent express and sufficient allegations of either agency of McInnis or Shingleton or both for Borka, or a conspiracy between or among Borka and McInnis, Shingleton, or both, specifically to develop Alabama as a market, we cannot impute to Borka, for the purpose of supporting personal jurisdiction over him, either the intentions and purposes of McInnis or Shingleton to develop Alabama as a market or their physical presences in Alabama.

The pleadings and affidavits in this case do not establish contacts between Borka and the state of Alabama sufficient to pass the tests of *Asahi* and *Sudduth*, *supra*. Accordingly, the trial judge erred in denying Borka's motion to dismiss for want of personal jurisdiction. Therefore, Borka is entitled to a writ of mandamus directing the trial judge to vacate her order denying Borka's motion to dismiss and to enter an order granting Borka's motion to dismiss.

In our case number 1990659, *Ex parte Pamela Alice Little Daniel*, the plaintiff herself has petitioned us for a writ of mandamus directing the trial judge to vacate the order she entered striking certain exhibits the plaintiff proffered at the hearing on the defendants' motions to dismiss for want of personal jurisdiction. The exhibits consist of materials introduced in a similar civil action by a different plaintiff against Snap Products, Inc., and Sam McInnis, but not against either Tim Shingleton or Michael Borka, in a federal district court in Minnesota.

The plaintiff has agreed anticipatorily that our sustaining the denial of the defendants McInnis's and Shingleton's motions to dismiss for want of personal jurisdiction moots the plaintiff's petition for a writ of mandamus insofar as it seeks relief from the trial judge's order granting those two defendants' motions to strike the plaintiff's exhibits. Thus we will address the plaintiff's petition for a writ of mandamus only insofar as it addresses the trial judge's order granting the defendant Borka's motion to strike the plaintiff's exhibits.

We are granting mandamus relief to the defendant Borka on the ground that he had insufficient contacts with the state of Alabama to support personal jurisdiction. From our examination of the plaintiff's proffered exhibits, we conclude that none of them constitute admissible evidence of sufficient contacts between Borka and the state of Alabama to support the exercise of personal jurisdiction over him. Therefore, we cannot and do not hold that the trial judge abused her discretion in excluding these exhibits for this purpose. No mandamus relief is due the plaintiff on her petition.

1990045 – WRIT DENIED AS TO DEFENDANTS MCINNIS AND SHINGLETON; WRIT GRANTED AS TO DEFENDANT BORKA.

Moore, C.J., and Houston, Harwood, and Woodall, JJ., concur.

See, Lyons, and Brown, JJ., concur in the result in part and dissent in part.

Stuart, J., recuses herself.*

1990659 – PETITION DISMISSED AS MOOT IN PART AND DENIED IN PART.

Moore, C.J., and Houston, Harwood, and Woodall, JJ., concur.

See, Lyons, and Brown, concur in part and concur in the result in part.

Stuart, J., recuses herself.*

*Justice Stuart was the trial judge in this case.

LYONS, Justice (concurring in the result in part and dissenting in part as to 1990045 and concurring in part and concurring in the result in part as to 1990659).

As to the holdings that Borka is not subject to *in personam* jurisdiction in the Baldwin Circuit Court and that Shingleton is subject to that court's personal jurisdiction, I concur in the result. As to the holding that McInnis is subject to *in personam* jurisdiction in that court, I respectfully dissent. The majority opinion improperly displaces the long-standing constitutional requirement of "minimum contacts" with a new, sliding scale based upon subjective views of the reprehensibility of the defendant's alleged conduct

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The United States Supreme Court has interpreted this clause to permit a forum state to subject a nonresident defendant to a lawsuit in its courts only when that party has sufficient "minimum contacts." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The sufficiency of a party's contacts are assessed as follows:

> "Two types of contacts can form a basis for personal jurisdiction: general contacts and specific contacts. General contacts, which give rise to general personal jurisdiction, consist of the defendant's contacts with the forum state that are unrelated to the cause of action and that are both 'continuous and systematic.' *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9, 415 . . . (1984); [other citations omitted] Specific contacts, which give rise to specific jurisdiction, consist of the defendant's contacts with the forum state that are related to the cause of action. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-75 . . . (1985). Although the related

> contacts need not be continuous and systematic, they must rise to such a level as to cause the defendant to anticipate being haled into court in the forum state. *Id.*"

Ex parte Phase III Constr., Inc., 723 So. 2d 1263, 1266 (Ala. 1998) (Lyons, J., concurring in the result). The majority opinion does not say whether McInnis's contacts are sufficient to subject him to general *in personam* jurisdiction or to specific *in personam* jurisdiction. However, neither is appropriate in this case.

McInnis served as a vice president and as chief executive officer of Snap Products, Inc., and was a stockholder in the company. In his affidavit, he states that he has been to Alabama only once, to call on an automobile parts supply company in Tuscaloosa. The supplier did not sell the Fix-A-Flat product at the time of his visit. The purpose of his visit was to convince the supplier to carry a particular line of products; that line *did not* include Fix-A-Flat. He was unsuccessful in this effort, and the supplier did not add any new Snap products to its stores.

Even though McInnis admits that he visited Alabama on behalf of Snap Products, his visit cannot be the proximate cause of the decedent's injuries because no sale of the Fix-A-Flat product was made as a result of his visit. The majority opinion reasons that *if* McInnis had succeeded in selling this unrelated line of products, the sales *would have* promoted the brand name and thus *would have* promoted the sales of Fix-A-Flat. While this presents an interesting theoretical possibility, the majority opinion does not explain how McInnis's one contact with Alabama *actually* contributed to the decedent's death. This Court has held that the contacts necessary for specific *in personam* jurisdiction must represent "a clear, firm nexus between the acts of the defendant and the consequences complained of." *Duke v. Young*, 496 So. 2d 37, 39 (Ala. 1986); see also *Ex parte Kamilewicz*, 700 So. 2d 340, 345 n.2 (Ala. 1997). Because the decedent's death did not arise from, or represent a clear, firm nexus to, McInnis's one

contact with Alabama, the trial court cannot obtain specific personal jurisdiction over McInnis. *Duke*, 496 So. 2d at 39.

McInnis also did not have the "continuous and systematic" contacts necessary to subject him to general *in personam* jurisdiction in Alabama. McInnis was in Alabama one time, in an unsuccessful attempt to sell a product other than the product that killed the decedent. As both a matter of law and English such contact is not "continuous and systematic." Contrary to the majority opinion, McInnis would have little reason to suspect that because of his one short, unsuccessful trip to sell a product unrelated to the one that killed the decedent, he had subjected himself to the jurisdiction of the courts of this state for any and all claims against him.

Perhaps to bolster McInnis's insufficient contacts to meet the minimum necessary for *in personam* jurisdiction, the majority opinion also notes that McInnis did not deny that he formulated, manufactured, labeled, and distributed the product that killed the decedent, even after he was aware that it was actually explosive. The majority opinion then concludes that "the reprehensible extent of McInnis's culpability . . . increases the importance of McInnis's contacts with Alabama enough that 'it is fair and reasonable to require [him] to come to this state to defend an action' . . . and enough that 'he should reasonably [have] anticipat[ed] being haled into court' here." ___ So. 2d at ___, quoting *Sudduth v. Howard*, 646 So. 2d 664, 667 (Ala. 1994) (bracketed language in original). The majority opinion cites no authority for its proposition that the reprehensibility of a nonresident defendant's conduct so "increases the importance" (___ So. 2d at ___) of a defendant's single contact with a state as to make constitutional an otherwise unconstitutional exercise of *in personam* jurisdiction, and I am not aware of any such authority. The majority opinion's new sliding-scale-*in personam*-jurisdiction test would mean that the more reprehen-

sible an out-of-state defendant's conduct is alleged to be,[1] the less actual contacts with a forum state need be shown to subject the defendant to general *in personam* jurisdiction.

Moreover, the majority marshals no evidence that McInnis's reprehensible conduct was targeted at Alabama. In *Sudduth v. Howard*, 646 So. 2d 664 (Ala. 1994), this Court stated its adherence to the rule of *Calder v. Jones*, 465 U.S. 783 (1984), and held that mere untargeted negligence would not suffice to create personal jurisdiction over a company's executives. In *Brooks v. Inlow*, 453 So. 2d 349, 354 (Ala. 1984), this Court held that the circuit court did not have *in personam* jurisdiction over two corporate executive defendants because their actions constituted no more than "untargeted negligence." If a corporate executive were subjected to the jurisdiction of every state where an injury occurred that was connected to a decision made by the executive, without regard to the executive's contacts with that state, then the long-standing constitutional test of "minimum contacts" would be erased. Such executives would effectively be subject to nationwide jurisdiction for claims arising from their alleged negligence. In the absence of any evidence that McInnis's allegedly "reprehensible" conduct was directed at the citizens of this state, those actions are merely untargeted negligence and cannot provide the basis for general *in personam* jurisdiction over McInnis. Should the plaintiff's allegations about McInnis's conduct prove to be true, I would agree with the majority's pejorative characterization of his conduct. However, *in personam* jurisdiction turns on the level of contacts, not the severity of wrongdoing.

---

[1] The majority notes that McInnis does not deny the plaintiff's allegations, but that fact is irrelevant to the sufficiency of his contacts with Alabama for *in personam* jurisdiction. The evidence must be viewed in the light most favorable to the nonmovant plaintiff. Charles Alan Wright & Arthur R. Miller, 5A *Fed. Prac. & Prod. Civ. 2d* § 1351 (2000).

As to Shingleton, I concur in the result that he is subject to the *in personam* jurisdiction of the Baldwin circuit court. Shingleton's four visits to this state did not directly result in or represent a clear, firm nexus to the decedent's death. *Duke*, 496 So. 2d at 39. However, his four trips to this state in three years to sell Snap products, including attempts to sell the Fix-A-Flat product, are sufficient to establish a pattern of business in this state. Thus, he may properly be subjected to the general *in personam* jurisdiction of the Baldwin Circuit Court,

Concerning case number 1990659, the plaintiff's petition for mandamus, I concur in part and concur in the result in part. I concur as to the holdings that the petition is moot as to defendant Shingleton and that the petition should be denied as to defendant Borka.

As to defendant McInnis, after reviewing the plaintiff's proffered exhibits, I would conclude that they do not constitute admissible evidence of sufficient contacts between McInnis and this state to support the exercise of *in personam* jurisdiction over him. The trial court did not abuse its discretion in excluding these exhibits for Rule 12(b)(2), Ala. R. Civ. P., purposes as to McInnis. Thus, I would deny the plaintiff's petition as to McInnis.

See and Brown, JJ., concur.

APPENDIX B

ALABAMA JUDICIAL DATA CENTER
IN THE CIRCUIT COURT OF BALDWIN

PAMELA ALICE LITTLE DANIEL ET AL	VS:	PANDORA MANU-FAC-TURING INC ET AL
FRAZER, A DANNER, JR. P.O. BOX 1686 MOBILE AL 3663		CASE NUMBER: CV 1998 001113 00 PARTY NUMBER: D001

NOTICE

6/23/99 — AFTER ORAL ARGUMENT, MCINNIS' MOTION TO DISMISS IS DENIED, BORKA'S MOTION TO DISMISS IS DENIED AND SINGLETON'S MOTION TO DISMISS IS DENIED

NOTICE ISSUED ON: 06/25/1999

JUDGE: LYN L. STUART
BALDWIN COUNTY COURTHOUSE

(06/25/1999) JUD

APPENDIX C

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

PAMELA ALICE LITTLE DANIEL, Administratrix of the Estate of JOE ED DANIEL, Deceased,	*	
Plaintiff,	*	CIVIL ACTION
VS.	*	
PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL - QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E and/or F, the person, firm or corporation who formulated, manufactured, sold, labeled, packaged, supplied and/or distributed the Fix-A-Flat *Non-Explosive Formula* aerosol tire sealant/inflator involved in the accident made the basis of this suit; G, H, I, J, K and/or L, the person, firm or corporation	*	AMENDED COMPLAINT NO:CV-98-1113

who packaged the Fix-A-Flat *Non-Explosive Formula* aerosol tire sealant/inflator involved in the accident made the basis of this suit; M, N, O, P, Q and/or R, the person, firm or corporation who modified, converted and/or altered the tire and rim assembly involved in the accident made the basis of this suit, all of whose true names and legal identities are otherwise unknown to the Plaintiff at this time, but will be substituted by amendment when ascertained, individually and jointly,

Defendants.

GENERAL ALLEGATIONS

1. Plaintiff is a resident of the State of Alabama.

* * *

4. Defendants Sam McInnis ("McInnis"), Michael Borka ("Borka"), and Tim Shingleton ("Shingleton") were, at all times relevant hereto, residents of the state of North Carolina and were either employed in managerial capacities, or were owners and/or officers of defendants Nationwide Industries, Inc.; and/or Snap Products, Inc.; and/or Snap Automotive Products, Inc.; and/or Pandora Manufacturing, Inc. and in such capacities acted as agents for the companies.

* * *

11. At all times relevant hereto, defendants Pandora Manufacturing, Inc., formerly known as Snap Products, Inc.; Snap Products, Inc.; Snap Automotive Products, Inc.; Pennzoil – Quaker State Company; and Nationwide Industries, Inc. were engaged in the business of manufacturing and marketing an aerosol tire inflator product ("fix a flat") throughout the United States, including the state of Alabama.

* * *

67. On or about June 4, 1997, Joe Ed Daniel, attempted to affix a small metal block, or lug, to a motor grader rim with a tire attached which had been previously inflated with

two cans of the DME **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator product.

68. Mr. Daniel, while performing a brief tacking repair to affix the metal block to the motor grader tire rim, was killed when the flammable DME propellant from the "fix a flat" product ignited and propelled the tire and/or components of the rim assembly into him thereby resulting in his being decapitated.

* * *

75. The **"fix a flat NON-EXPLOSIVE FORMULA"** part number S455K, DOT 2Q involved in the accident made the basis of this suit was formulated, manufactured, labeled, packaged, sold, supplied and/or distributed by the Defendants, PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R.

76. Prior to June 4, 1997, the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECH-

NOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, either formulated, manufactured, labeled, packaged, sold, supplied and/or distributed the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator/sealant involved in the accident made the basis of this suit.

* * *

81. Plaintiff further alleges that the injuries and subsequent death of Joe Ed Daniel was proximately caused by the negligence of the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, in one or more of the following respects:

a. Negligently formulating and/or manufacturing the **"fix a flat NON-EXPLOSIVE FORMULA"** involved in the accident made the basis of this suit;

b. Negligently selling, supplying and/or distributing the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit when the Defendants knew or in the exercise of reasonable care, should have known that said product referred to above was in a defective and unreasonably dangerous condition;

c. Negligently selling, supplying and/or distributing a flammable and explosive product when other non-flammable and non-explosive formu-

lations were available in the marketplace for the purpose of providing emergency and/or temporary tire repairs;

d. Negligently failing to provide adequate warnings to the decedent and others similarly situated as to inherent dangers associated with the use *of* **"fix a flat NON-EXPLOSIVE FORMULA"** of which the Defendants were aware;

e. Negligently failing to warn the decedent and others similarly situated of the dangerous, flammable and explosive propensities of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

f. Negligently labeling and/or packaging the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

g. Negligently failing to adequately test the explosiveness and/or flammability of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

h. Negligently failing to adequately test the **"fix a flat NON-EXPLOSIVE FORMULA"** to determine that it was safe for its intended uses and purposes;

i. Negligently misrepresenting that the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit was a *Non-explosive Formula*, when the Defendants knew or should have known of its dangerous flammable and/or explosive characteristics;

j. Negligently continuing to manufacture, sell, supply and/or distribute **"fix a flat "NON-EXPLOSIVE FORMULA"** after said product was known by the Defendants to be flammable, explosive and unreasonably dangerous for its intended uses;

k. Negligently continuing to manufacture, sell, supply and/or distribute **"fix a flat NON-EXPLOSIVE FORMULA"** which was extremely flammable and explosive after a safe formulation was available.

l. Negligently failing to take appropriate measures to remedy the defective nature of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit.

m. Negligently failing to remove and/or recall **"fix a flat NON-EXPLOSIVE FORMULA"** from the marketplace after becoming aware of the flammable, explosive and unreasonably dangerous propensities of the product.

* * *

83. Plaintiff further alleges that the injuries and subsequent death of the said Joe Ed Daniel was proximately caused by the wanton conduct of the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, in one or more of the following respects:

a. Wantonly formulating and/or manufacturing the **"fix a flat NON-EXPLOSIVE FORMULA"** involved in the accident made the basis of this suit;

b. Wantonly selling, supplying and/or distributing the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit when the Defendants knew or in the exercise of reasonable care, should have known that said product referred to above was in a defective and unreasonably dangerous condition;

c. Wantonly selling, supplying and/or distributing a flammable and explosive product when other non-flammable and non-explosive formulations were available in the marketplace for the purpose of providing emergency and/or temporary tire repairs;

d. Wantonly failing to provide adequate warnings to the decedent and others similarly situated as to inherent dangers associated with the use of **"fix a flat NON-EXPLOSIVE FORMULA"** of which the Defendants were aware;

e. Wantonly failing to warn the decedent and others similarly situated of the dangerous, flammable and explosive propensities of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

f. Wantonly labeling and/or packaging the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

g. Wantonly failing to adequately test the explosiveness and/or flammability of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

h. Wantonly failing to adequately test the **"fix a flat NON-EXPLOSIVE FORMULA"** to determine that it was safe for its intended uses and purposes;

i. Wantonly misrepresenting that the **"fix a flat NON-EXPLOSIVE FORMULA"** made the

basis of this suit was a *Non-explosive Formula*, when the Defendants knew or should have known of its dangerous flammable and/or explosive characteristics;

j. Wantonly continuing to manufacture, sell, supply and/or distribute **"fix a flat"** as a **"NON-EXPLOSIVE FORMULA"** after said product was known by the Defendants to be flammable, explosive and unreasonably dangerous for its intended uses;

k. Wantonly continuing to manufacture, sell, supply and/or distribute **"fix a flat NON-EXPLOSIVE FORMULA"** which was extremely flammable and explosive after a safe formulation was available.

l. Wantonly failing to take appropriate measures to remedy the defective nature of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit.

m. Wantonly failing to remove and/or recall **"fix a flat NON-EXPLOSIVE FORMULA"** from the marketplace after becoming aware of the flammable, explosive and unreasonably dangerous propensities of the product.